No. —

In the Supreme Court of the United States

OCTOBER TERM, 1940

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALICE GRAY KALES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	16
Appendix	17

CITATIONS

Cases:

Art Metal Const. Co. v. *United States*, 47 F. (2d) 558, certiorari denied, 283 U. S. 863	12
Baltimore & Ohio R. R. v. *United States*, 260 U. S. 565	12
Lewis v. *Reynolds*, 284 U. S. 281	14
Ordway v. *United States*, 37 F. (2d) 19	12
Philipsborn v. *United States*, 53 F. (2d) 133, certiorari denied, 285 U. S. 548	12
Rock Island &c. R. R. v. *United States*, 254 U. S. 141	8
United States v. *Felt & Tarrant Co.*, 283 U. S. 269	8
Waters v. *United States*, 12 F. Supp. 658, affirmed, May 15, 1935	13
Western Maryland Ry. Co. v. *United States*, 23 F. Supp. 554	15
Woodworth v. *Kales*, 26 F. (2d) 178	5, 7, 10

Statutes:

Revised Statutes:	
Sec. 3226 (U. S. C. Title 26, Sec. 1672)	17
Sec. 3228 (U. S. C., Title 26, Sec. 1433)	17
Revenue Act of 1926, c. 27, 44 Stat. 9;	
Sec. 284	18
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 608 (U. S. C., Title 26, Sec. 1674)	18

Miscellaneous:

Treasury Regulations 65, promulgated under the Revenue Act of 1924—Art. 1306	19
T. D. 4266, VIII-1 Cum. Bull. 111, promulgated March 27, 1929	19

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The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above cause on November 9, 1940.

OPINIONS BELOW

The opinion of the District Court (R. 45–53) is not officially reported. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit is reported in 115 F. (2d) 497.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered November 9, 1940. The Government's petition for rehearing was denied on

December 10, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In 26 F. (2d) 178 the court below awarded the taxpayer a refund of income taxes for the year 1919 based upon the March 1, 1913, value of certain Ford Motor Company stock sold by her in 1919. She subsequently brought this suit for an additional refund for the same year, with respect to the same sale, and seeks the additional refund based upon an even higher valuation of that stock. In opposing the maintenance of this suit, a number of technical questions are raised which may conveniently be summarized as follows:

1. Whether the present suit is founded upon a timely claim for refund; whether a certain unsworn letter of March 23, 1925, written by the taxpayer to the collector, even if otherwise a valid claim for refund, was merged with and became extinguished by the judgment in the earlier suit.

2. Whether that letter, in any event, is not a claim for refund, since it fails to make any present claim and merely announces that the taxpayer *will* make a claim for refund in the future.

3. Whether that letter fails to qualify as a valid claim for refund because of certain conditions which taxpayer attached thereto.

4. Whether the maintenance of this suit involves splitting a single cause of action which is

not permitted under the statutory scheme for litigating Federal taxes.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 17–20.

STATEMENT

This suit is against the United States to recover an alleged overpayment of income taxes for the year 1919 in the amount of $195,710.44, with interest as provided by law (R. 17). The District Court granted the Government's motion to dismiss the amended petition (R. 53–54). On appeal, the Circuit Court of Appeals reversed the judgment and denied the Government's petition for rehearing.

The amended petition alleged, among others, the following facts (R. 12–18):

Taxpayer filed her income tax return for the calendar year 1919, reporting therein income realized by her upon the sale of stock of the Ford Motor Company, treating the cost basis of that stock as its March 1, 1913, value, in the amount of $9,489.34 per share. This value was in accordance with a prior determination of the Commissioner of Internal Revenue. The tax shown on the return was paid in four installments, the last of which occurred on December 15, 1920 (R. 12–13). In March 1925, the Commissioner of Internal Revenue redetermined the March 1, 1913,

value of the stock to be less than previously determined, and accordingly made a jeopardy deficiency assessment against the taxpayer in the amount of $2,627,309.05. This jeopardy assessment was paid by the taxpayer on March 24, 1925, under a letter of protest dated March 2[illegible], 1925, addressed to the Collector of Internal Revenue (R. 14, 19–24).

The letter consisted of 2 unnumbered introductory paragraphs, 10 numbered paragraphs and a final unnumbered paragraph. The two introductory paragraphs complained generally of the deficiency assessment and stated that the taxpayer protested "for the following particular reasons". There followed the 10 numbered paragraphs,[1] and the letter concluded with an unnumbered paragraph in which the taxpayer announced that she "will make claim for the refund of the deficiency tax herewith paid." and that she would bring appropriate legal proceedings if such claim for refund be denied (R. 19–24).

In accordance with that announced intention, the taxpayer, on June 4, 1925, did file a claim for refund in the amount of $2,627,309.05, comprising

[1] The gist of the various numbered paragraphs is that the valuation originally approved by the previous Commissioner could not be reopened for redetermination. Paragraphs numbered 9 and 10 state further that if it be held that the earlier determination could be reopened, then the taxpayer will claim an even higher valuation for the stock than that upon the basis of which her 1919 returns were originally filed.

the amount of the jeopardy assessment paid on March 24, 1925 (R. 14–15). That claim of the taxpayer was litigated in the Circuit Court of Appeals for the Sixth Circuit. *Woodworth* v. *Kales*, 26 F. (2d) 178. In that claim and proceeding the taxpayer contended that the Commissioner of Internal Revenue was precluded from changing the first determination made as to the March 1, 1913, value of the Ford Motor Company stock, being $9,489.34 per share, and that contention was approved by both the District Court and the Circuit Court of Appeals in that suit (R. 15). The judgment claim filed by the taxpayer on September 24, 1928, comprising this judgment was satisfied, with interest, on November 13, 1928 (R. 15–16).

On September 24 1928, the taxpayer filed what purported to be an amendment to a claim for refund which was described as "the refund claim filed March 24, 1925," and which in fact was nothing more than the letter just outlined (R. 15, 26–29). In that "amendment" the taxpayer sought an additional refund for the year 1919 in the amount of $195,710.44 plus interest, based on the contention that the Ford stock had a March 1, 1913 value of $10,000 per share (R. 26–29).

The Treasury refused to make any additional refund (R. 34), and despite the taxpayer's subsequent transparent attempt to induce the Commissioner to "disallow" her "claim for refund" (cf. R. 35), she was informed that the Bureau of Inter-

nal Revenue did not regard her demand for additional refund as a claim for refund and that there was therefore no necessity for a disallowance (R. 37–38). She thereupon brought this suit in the District Court on July 7, 1936, which the District Court dismissed on motion of the Government.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the present suit is maintainable.

2. In holding that there was in existence at the time this suit was brought a valid claim for refund which could support this suit.

3. In holding that the taxpayer's letter dated March 23, 1925, constituted a claim for refund.

4. In failing to hold that such letter, even if a claim for refund, was merged with and extinguished by the judgment entered pursuant to the decision of the court below in 26 F. (2d) 178.

5. In failing to hold that such letter, even if otherwise a claim for refund and not extinguished by such prior suit, was fatally defective because of the conditions which the taxpayer specified therein

6. In failing to hold that the decision in the prior suit in any event foreclosed the maintenance of the present suit.

7. In failing to hold that the taxpayer's cause of action, if she had any, was barred by the statute of limitations.

8. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

More than 12 years ago the court below entered a final judgment in favor of the respondent herein granting her a refund of income taxes for the year 1919 in the amount of $2,627,309.05 with interest. *Woodworth* v. *Kales*, 26 F. (2d) 178. That refund related solely to the computation of profit upon sale of certain Ford Motor Company stock by respondent in 1919; more specifically, it related to the determination of the March 1, 1913, value of the stock as a basis for computing the gain upon sale, and the refund was made upon the basis of a March 1, 1913, valuation of $9,489.24 per share. The present proceeding is also a suit for refund of respondent's 1919 income taxes, in which respondent seeks an additional refund of $197,710.44 with interest [2] based upon the identical sale of Ford stock in 1919 and is founded on the contention that the stock had a March 1, 1913, value of $10,000 per share.

The amazing decision of the court below in permitting respondent to bring this suit is such a departure from the usual course of judicial proceedings as to call for review by this Court. The

[2] The statutory interest rate of 6% per annum when applied from the year 1920, the date of payment of the taxes herein, would more than double the principal amount which respondent seeks to recover.

case is entangled in technical questions, each, possibly, of apparent narrowness in scope; but the entire picture revealed by exploring these technical questions carefully will disclose how far the court below has departed from the usual course of judicial proceedings and what potential means it has provided for astute tax counsel to litigate and relitigate liabilities for tax years which should long have been closed.

1. This suit is fatally defective because it is not founded upon a timely claim for refund.[3] The taxes which respondent seeks to recover were paid during the year 1920 (R. 13), and the time within which she could have filed claim for refund was, under Section 284 (b) and (a) of the Revenue Act of 1926, *infra*, p. 18, four years from the date of payment, or at most, five years from the date the return was due.[4] Thus, April 14, 1925, was the last day upon which respondent could have filed a timely claim. And under Article 1396 of Treasury Regulations 65, the regulations then in force, see Appendix, *infra*, p. 19, such claim was required to be filed on "Form 843." No such claim was ever filed by respondent prior to April 14, 1925, nor does

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[3] That the filing a timely claim for refund is a prerequisite to a suit for refund of federal taxes has often been recognized by this Court. See, e. g., *Rock Island &c. R. R.* v. *United States*, 254 U. S. 141; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269.

[4] The return for the year 1919 was due on March 15, 1920, and was, in this case, extended by the Collector for 30 days from March 15, 1920 (R. 13).

she contend that she filed any such claim. Her entire case rests upon a certain letter of protest dated March 23, 1925 (R. 19–24) which she addressed to the Collector of Internal Revenue and which accompanied the payment of a deficiency assessed by the Commissioner, which deficiency is not here in controversy. Her present contention is that that letter (as "amended" by an admittedly untimely claim dated September 24, 1928) constituted a claim for refund of the taxes which she now seeks to recover and is sufficient to support the present suit. The utter lack of any foundation for that position will be seen if that letter is read in its entirety and examined in the light of the surrounding circumstances.

On or about March 13 or 14, 1925, the Commissioner made a jeopardy assessment against respondent for the year 1919 in the amount of $2,627,309.05 on the ground that she had underpaid her taxes for that year by using an excessively high basis for her Ford Motor Company stock in computing gain on sale. Thereafter, on March 24, 1925, respondent paid that jeopardy assessment, and accompanied that payment with the letter of protest referred to above[2] (R. 19–24). The letter complained against the assessment of the deficiency, contending that her 1919 taxes had been

[2] That letter was dated March 23, 1925 (R. 19), and it is variously referred to as the letter of March 23 or March 24, 1925.

paid in accordance with a valuation of the Ford stock accepted by the Commissioner of Internal Revenue at that time, and that it was not open to the successor Commissioner or the Treasury Department to place any different valuation upon that stock. In paragraphs numbered 9 and 10 of the letter, she stated further that if the determination of the former Commissioner should be set aside, she would then undertake to show and claim that the value of the stock was even higher than originally determined. The letter concluded with a final un-numbered paragraph in which respondent declared that (R. 24) "this taxpayer *will* make claim for the refund of the deficiency tax herewith paid." [Italics supplied.]

Nowhere in the letter was there any indication that respondent was treating it as a claim for refund, or that she regarded it as anything more than a protest accompanied with a declaration of intention to file a claim for refund. And indeed, on June 4, 1925, she did file a claim for refund for $2,627,309.65 in accordance with the last paragraph of her letter of protest. She thereupon brought suit upon that claim and a refund in her favor was affirmed by the Circuit Court of Appeals (*Woodworth* v. *Kales*, 26 F. (2d) 178), on the ground that the valuation of the stock once having been determined by the Commissioner could not later be reopened. That judgment gave respondent everything that she demanded in her

letter of protest as well as in her June 4, 1925, claim. That letter was merely preliminary to or supplementary to the June 4, 1925, claim and was merged with and extinguished by the final judgment entered pursuant to the opinion in 26 F. (2d). Even if that letter might otherwise be regarded as an "informal" claim, it ceased to have any vitality as such after that litigation, and therefore cannot afford any foundation for the present suit.

2. But even if there had not been any such litigation as culminated in the opinion in 26 F. (2d) which extinguished the underlying claim, the unsworn letter of March 23, 1925, could not in any view be treated as a claim for refund of the taxes which respondent seeks here.

That letter was merely a letter of protest against the deficiency on the ground that the contested valuation had been finally determined by a previous Commissioner and could not be reopened. The first two unnumbered paragraphs, the first eight numbered paragraphs and the last unnumbered paragraph of the letter deal exclusively with the impropriety of the deficiency assessment and look toward the filing of a claim, which in fact was filed on June 4, 1925. Paragraphs numbered 9 and 10 are merely adjuncts to the primary protest, and simply announce that if the determination of the previous Commissioner is not final, respondent *will* claim an even higher valuation. But just as the

main part of the letter was not a claim for refund with respect to the deficiency, so these subsidiary paragraphs constituted at most a mere declaration of intention to make a claim at some later time.

In holding that the letter did constitute a claim for refund, the decision of the court below is in conflict in principle with *Art Metal Const. Co.* v. *United States*, 47 F. (2d) 558 (C. C. A. 2d), certiorari denied, 283 U. S. 863, where the Circuit Court of Appeals said (pp. 559, 560):

> The supposed claim was no claim at all; it was a mere caveat, an attempt to reserve the taxpayer's right at some later time to file a claim * * *
>
> * * * * *
>
> * * * To allow him [taxpayer] to substitute, not a claim, but a warning that he may in the future make a claim—which is all on any theory that the supposed claim was—substantially dispenses with the statute altogether. Presumably, it was to avoid exactly such resulting uncertainties that the act and the regulations required something definite enough for action. * * *

See also *Ordway* v. *United States*, 37 F. (2d) 19 (C. C. A. 2d); *Philipsborn* v. *United States*, 53 F. (2d) 133 (C. Cls.), certiorari denied, 285 U. S. 548. Cf. *Baltimore & Ohio R. R.* v. *United States*, 260 U. S. 565.

It seems quite plain both from the language of the letter and the circumstances surrounding it

that the taxpayer conveyed at most a warning that she might file a claim in the future.[6]

3. Moreover, even if the March 23, 1925, letter were an otherwise proper claim for refund, it would be invalid because of the conditions which respondent attached thereto. The court below held that the letter "was in the nature of a counterclaim" which "did not mature until the March 1, 1913, value of the stock, as previously determined by the Commissioner, was changed by his office, the Board of Tax Appeals or some court of competent jurisdiction."

Thus, the court treated the letter as a contingent claim, which completely suspended the statute of limitations until some future day when one of the contingencies specified by the taxpayer might occur. And the court has treated as such a contingency a subsequent decision of the Board of Tax Appeals in a proceeding to which she was a stranger.

It is a matter of great importance in the administration of the revenue laws to have this deci-

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[6] The decision of the court below is also in conflict with its May 15, 1935, *per curiam* affirmance of *Waters* v. *United States*, 12 F. Supp. 658 (W. D. Mich.). In that case it was held that a letter of protest accompanying the payment of tax could not be treated as a claim for refund. Although the court below states (R. —) that the tax in the *Waters* case was not paid at the time the letter was sent, the plain fact is that the payment was transmitted *simultaneously* with the letter, as noted by the District Court in the *Waters* case, 12 F. Supp. at 659.

sion reviewed. For, if the principle announced by the court below is generally followed, taxpayers would be permitted to suspend the statute of limitations operating against claims for refund by asserting that they will file claims in the future if and when various contingencies occur. If that proposition were correct there would have been no need for the enactment of Section 608 (b) (2) of the Revenue Act of 1928, authorizing an agreement in writing between the taxpayer and the Commissioner to suspend the statute of limitations for filing a suit for refund until final decision in one or more cases pending in either the courts or the Board of Tax Appeals. It is of substantial importance to the Commissioner in his administration of the tax laws that he be not forced to consider at his peril every informal assertion to him by a taxpayer as constituting a claim for refund.

4. Finally, the judgment in the former suit (26 F. (2d) 178) forecloses respondent from maintaining the present suit, even if the March 23, 1925, letter be regarded as a valid and independent claim for refund. To permit her to maintain this suit would be to permit her to split a cause of action. Her alleged cause of action is that she overpaid her taxes for the year 1919. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. In providing various alternative methods to litigate the correctness of Federal income taxes (i. e. in the District

Courts, the Court of Claims, or the Board of Tax Appeals), Congress could not have intended to permit a taxpayer to contest the same taxes in more than one forum, or to bring successive suits in the same forum.

That the taxes for any given year may furnish the basis for only one cause of action has been demonstrated in *Western Maryland Ry. Co.* v. *United States*, 23 F. Supp. 554 (Md.), where the court went even further and held that a prior suit for refund of taxes precluded a subsequent suit for refund of interest on those taxes which the taxpayer had likewise overpaid.

It is a matter of considerable importance to the Government that this question be finally settled by this Court. Otherwise, the Government might be harassed by a multiplicity of suits for the same tax year. It seems inconceivable that Congress intended liability for a single tax year to be kept in suspense until after the termination of a series of suits which could be expanded almost indefinitely by the ingenuity of counsel.[7]

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[7] It is perhaps true, as noted by the court below (R. ——), that in her suit against Collector Woodworth, respondent could not have asked for recovery of taxes paid to a predecessor collector. But she certainly could have brought a single suit against the United States in the Court of Claims for the full amount of any overpayment for the year 1919. That her *remedy* against Collector Woodworth permitted her to recover only on part of her cause of action does not justify splitting up the cause of action. Her remedy in the Court of Claims was complete.

As a result of the decision below, this case has been remanded to the District Court for a trial on the facts. The principal question of fact is the March 1, 1913, value of the Ford Motor Company stock. Since that stock was closely held, the trial undoubtedly would involve a valuation of the entire company as of that date, thus necessitating proceedings of unusual magnitude, and calling for the testimony of numerous expert witnesses that might well prolong this controversy for a considerable period. In view of the exceedingly doubtful propriety of maintaining this suit at all, the questions here presented should be passed upon by this Court, so that the Government may be spared the burden and expense of the protracted litigation which is threatened in the District Court, if the suit has not been properly brought.

CONCLUSION

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

MARCH 1941.

APPENDIX

Revised Statutes, as amended:

SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided

by law in the case of income, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. * * * (U. S. C., Title 26, Sec. 1433.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefore is filed by the taxpayer; and

* * * * *

(h) Except as provided in subdivision (d) this section shall not (1) bar from allowance a claim for credit or refund filed prior to the enactment of this Act which but for such enactment would have been allowable, or (2) bar from allowance a claim in respect of a tax for the taxable year 1919 or 1920 if such claim is filed before the expiration of five years after the date the return was due.

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

* * * * *

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

* * * * *

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, sec. 1674.)

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 1306. *Claims for refund of taxes erroneously collected.*—Claims by the taxpayer for the refunding of taxes, interest, penalties and additions to tax erroneously or illegally collected shall be made on Form 843. All facts relied upon in support of the claim should be clearly set forth under oath. * * *

T. D. 4266, VIII-1 Cum. Bull. 111 (promulgated March 27, 1929):

* * * * *

(2) A refund or credit may be allowed after the expiration of such statutory period of limitation, even if no formal claim has been filed prior thereto, in any case in which a so-called informal or defective claim, duly filed prior to the expiration of such period and stating specifically the grounds for the refund or credit, is perfected by the filing

of a claim prior to May 1, 1929, which complies with the requirements of Treasury Decision 4265, but (a) only the grounds set forth in such formal claim which were also set forth in such informal or defective claim will be considered, and (b) no claim in respect of which a suit in court has been commenced at any time may be so perfected.

U. S. GOVERNMENT PRINTING OFFICE 1941